1969

Florentino Lovato v. Beatrice Foods, Dba Utah By-Products Company : Brief of Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

FLORENTINO LOVATO, Plaintiff and Appellant,	:	
vs	:	Case No. 11453
BEATRICE FOODS, DBA UTAH BY-PRODUCTS COMPANY, Defendant and Respondent.	:	

BRIEF OF APPELLANT

Appeal from the Judgment of the 2nd District Court for Weber County, HONORABLE CHARLES G. COWLEY, JUDGE.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FLORENTINO LOVATO,
Plaintiff and Appellant,

vs.

BE[illegible] FOODS, DBA
[illegible]-PRODUCTS COMPANY,
Defendant and Respondent.

STATEMENT OF KIND OF CASE

This is an action brought pursuant to [illegible] 35[illegible] Code Annotated, 19[illegible], [illegible] filed by plaintiff as a result of [illegible] injuries sustained during employment with defendant.

DISPOSITION IN LOWER COURT

[illegible] defendant's motion for summary judgment was granted, and plaintiff's motion [illegible] of defendant's answers was denied [illegible] not stating grounds on which it was [illegible].

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of [illegible] judgment of dismissal, and reversal of the Court's denial of plaintiff's motion [illegible].

STATEMENT OF FACTS

On or about June 14, 1968, plaintiff was employed by defendant at its Ogden plant. His employment included, among other things, the operation of a machine which processed hides. This machine and other equipment issued to plaintiff was needlessly unsafe, and defendant knew it but insisted that the equipment be used. While working with this equipment, and as a result of its unsafe condition, plaintiff's hand was pulled into the gears of the machine, and his left thumb was severed at the first joint. This occurred on the date above stated. Although plaintiff personally made demand for some compensation for this injury, defendant gave none. Plaintiff was, of course, treated for the injury, lost time from work, and ultimately lost his job as a result of this injury, thus sustaining both special and general damages.

On January 26, 1963, the Industrial Commission of Utah issued a certificate certifying that Beatrice Foods Company was qualified as a self-insured as of February 28, 1963. From that time until well after this suit was brough Beatrice Foods never, at any time, filed with the Industrial Commission any proof indicating its financial ability to pay direct compensation as required by section 35-1-46, Utah Code Annotated 1953. The only document which might be considered such a statement was a request for inclusion of Utah By-Products with Beatrice Foods as a self-insured, this being accomplished in February, 1966, over two years prior to plaintiff's injury. Defendant did continue to pay to the Tax Commission its premium tax.

Finally, the Industrial Commission, by affidavit, has sworn that it did not enforce the requirement that companys who expected to qualify

as self-insurers file annual statements of financial ability to pay direct compensation.

ARGUMENT

POINT I

THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE STATUS OF THE EVIDENCE SHOWS CLEARLY THAT DEFENDANT HAD FAILED TO COMPLY WITH § 35-1-46, UTAH CODE ANNOTATED, 1953, AS AMENDED.

In his complaint plaintiff has made it clear that he is relying on § 35-1-57 UCA, 1953, as amended, in bringing this action. That section reads, in part, as follows:

> "Employers who shall fail to comply with the provisions of section 35-1-46 shall not be entitled to the benefits of this title during the period of noncompliance, but shall be liable in a civil action to their employees for damages suffered by reason of personal injuries arising out of or in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employees, and also to the dependents or personal representatives of such employees where death results from such injuries."

As the quotation indicates, the standard for determining whether the section applies is compliance with § 35-1-46. (Ibid). It should be noted that § 35-1-57 (Ibid) does not set as its standard "substantial compliance with the Workman's Compensation Act," but rather uses one section of that act as its standard.

What does section 35-1-46 require of an employer who seeks to obtain the protection of the Workman's Compensation Act by being a self-insurer? It states:

"Employers.....shall secure compensation to their employees.....

(3) By furnishing annually to the commission satisfactory proof of financial ability to pay direct compensation in the amount, in the manner and when due as provided for in this title. (Emphasis added) § 35-1-46 UCA, 1953."

Plaintiff's argument is based on the rules of statutory construction. We maintain that the Court below was bound by the statute, and in applying the statute the Court was bound by basic rule of statutory construction, namely that a statute is open to construction only where the language of the statute is ambiguous or is capable of two or more constructions.

(See F. Salt Lake Union Stock Yards vs. State Tax Commission 93 Utah 166, 71 P 2d 538, 1937; and Spring Canyon Coal Co. vs. Industrial Commission, 74 Utah 103, 277 P 206, 1929. These cases are cited only as they bear on the rule of statutory construction stated. Neither case was involved with an interpretation of the statute herein involved.)

The language of the Sections in issue is clear, and lead inexorably along this logical path:

a. Employees have a civil action against their employers for damages negligently caused them during employment whenever said employer fails to comply with 35-1-46.

b. An employer complies with section 35-1-46 in only three ways -

1. By obtaining insurance through the State Insurance Fund.

2. By insuring with a competent company, or

3. By furnishing annually to the commission proof of financial ability to pay direct compensation.

We submit that these are the only ways to comply with 35-1-46. And it is undisputed that defendant in this case did not insure with the State Insurance Fund or by other competent insurer. The only remaining method of compliance is "furnishing annually to the commission" proof of ability to pay. Here again, we submit, there is no dispute. Plaintiff's affidavit from Virginia Leahy, says, unequivocally,

> "that for the year 1968 neither Beatrice Foods Company nor Utah By-Products has furnished to the Industrial Commission satisfactory proof of financial ability to pay direct compensation....."

Defendant's exhibits do not contradict this. Indeed they make it clear that the only showing made by defendant to the Industrial Commission which might be considered proof of financial ability occurred over two years before plaintiff was injured. Thus, we submit, failed to comply with 35-1-46 and plaintiff is thus entitled to the remedies of 35-1-57.

Defendant contends that it is entitled to the protection of the Workman's Compensation Act because of three circumstances.

FIRST. The defendant was issued a certificate as a self-insurer in 1963 and it was never revoked. To this, plaintiff responds that the Industrial Commission cannot grant a permit from the requirements of the law by issuing a certificate. However, that certificate itself recognizes the primacy of the law when it states:

> "This permit is granted subject to the provisions of the Workman's Compensation Act....."

SECOND. Defendants maintain that the Industrial Commission "has not required self-insureds to furnish annual proof of financial ability to pay direct compensation." This, defendant maintains, excuses it from its noncompliance. To this, plaintiff responds that the Workmen's Compensation Act provides two sets of sanctions for those who fail to comply with Section 35-1-46. The first, set forth in that section itself empowers the Industrial Commission,

> ".....to maintain a suit in any Court to enjoin any employer within the provisions of this act, from further operation of the employers business, where the employer has failed to insure or keep insured in one of the three ways in this section provided, the payment of compensation to injured employees ....." (Section 35-1-46, UCA 1953.)(Emphisis added).

The second sanction against the noncomplying employer is the granting of a civil cause of action to the employee in section 35-1-57. These sanctions are in no way joined; that is, there is no requirement in 35-1-57 that an employee must show action by the Industrial Commission before his cause of action accrues. It certainly might be argued

that the clear intent of 35-1-57 is especially directed at the instant case. For, if the Industrial Commission uses to the full its enforcement powers, then one of two results must obtain. Either the employer complies, and thus 35-1-57 becomes unnecessary as to him. Or he ceases to do business, in which event he will have no employees to enforce section 35-1-57, or even to be injured. Thus, section 35-1-57 becomes meaningful only when the Industrial Commission does not use its enforcement powers, or uses them in only a limited way.

At this point some general observations are appropriate. The Workman's Compensation Act takes away from the worker his common law remedy for employer negligence leading to injury. It replaces this common law remedy and its problems of proof with a remedy intended to be certain. In exchange for certainty, the worker gives up an opportunity to recover large sums from industrial injuries, and the company, in exchange for providing certainty of compensation, undertakes a liability both determinate and limited. (CF 58 Am Jur "Workmen's Compensation" § 2).

If Workman's Compensation ceases to be certain, then the employee loses all advantage. Thus a provision, like section 35-1-57, restores to the worker what he has given up, namely his common law remedy, whenever the certainty of his recovery under Workman's Compensation is jeopardized. It is to assure this certainty that insurance, or adequate proof of ability to pay, is required.

With this in mind, it would be foolish to contend that when the Industrial Commission fails to enforce the legislative standards set up

to assure certainty of payment, it also takes from the employees his protection against both company and commission, namely his common law remedy.

THIRD. Defendant contends that because he has paid his premium tax as required by section 35-1-53, Utah Code Annotated, 1953, he has complied with section 35-1-46 (Ibid). To this plaintiff responds that it is a non-sequitor to say that by paying money to the Tax Commission an employer satisfies his obligation to give information to the Industrial Commission. The reasons for the two requirements are substantially different. One's ability to pay a premium tax does not necessarily guarantee his ability to pay compensation benefits.

Finally, defendant might argue that the word "annually" in section 35-1-46, sub-section 3, is not essential. To this, plaintiff responds that as originally written, this section did not require a self-insurer to submit annual reports. But in 1921, this section was amended by the legislature to insert the word "annually". (CF-Statutory history in notes following § 35-1-46, Utah Code Annotated 1953, as amended). Under the rules of statutory construction, then,

> ".....the presumption is that every amendment of a statute is made to affect some purpose, and effect must be given the amended law in a manner consistent with the amendment." (50 Am Jur "Statutes" § 275).

As we have pointed out, certainty of payment is of the essence of Workmen's Compensation, and the legislature sets standards for insuring that certainty.

The clear and unequivocal meaning of the amendment is that certainty of payment by self-insureds can be controlled better by an annual reporting than by a once-in-a-lifetime filing.

It is another rule of statutory construction that meaning must be given to each and every word of statute. If defendant, here, is found to have complied with section 35-1-46, then the word "annually" will henceforth have no meaning.

We submit, then, that the Court below erred in granting defendant's motion for summary judgment, for defendant had failed to comply with section 35-1-46, Utah Code Annotated 1953, and, therefore, plaintiff has a cause of action under § 35-1-57, Utah Code Annotated 1953.

POINT II

THE COURT BELOW ERRED IN DENYING PLAINTIFF'S MOTION TO STRIKE CERTAIN OF DEFENDANT'S DEFENSES.

If plaintiff has a cause of action it arises as a result of section 35-1-57, Utah Code Annotated 1953. This, of course, is the subject matter of Point I above. If the Court finds for plaintiff on Point I, then it must follow that defendant's First, Third, Fourth, and Fifth defenses fail.

Defense numbers One and Three will fail directly as a result of a finding for plaintiff in Point I above. Defenses Four and Five will fail because they are specifically denied defendant under section 35-1-57, Utah Code Annotated 1953.

We submit this argument as self-explanitory

Respectfully submitted,

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